

M. Rivera-Mindt - Recross/Trowel

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1 MS. DOLAN: Nothing further.

2 THE COURT: Your witness.

3 MR. TROWEL: Very briefly, your Honor. Thank you.

4 RECROSS-EXAMINATION

5 BY MR. TROWEL:

6 Q Dr. Rivera-Mindt, I'm showing you what has been --
7 withdrawn.

8 I'm showing you what has been admitted as
9 Defense Exhibit 1.

10 Is this a copy of Dr. Brauman's report, Dr.
11 Brauman at the MCC?

12 A I believe so, yes.

13 Q And you reviewed this report, correct?

14 A Yes.

15 Q I'm turning to page 13. This is the final page of the
16 report.

17 Is this the page that has Dr. Brauman's
18 diagnosis?

19 A Yes.

20 Q What was her diagnosis?

21 A I will read from my copy.

22 Q Sure. It is in subparagraph one.

23 A Regarding the issue of mental disease or defect,
24 Mr. Bumagin currently meets the criteria for dementia not
25 otherwise specified.

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1 Q Did Dr. Brauman diagnose the defendant with Alzheimer's,
2 yes or no, please?

3 A No.

4 Q I'm showing you what has been marked for identification,
5 but not admitted, as Government Exhibit 1.

6 Is this a copy of Dr. Grant's report?

7 A Yes.

8 Q And did you review this report?

9 A I did.

10 Q I'm turning to page --

11 THE COURT: Why are you referring to a document that
12 the court expressly kept out of evidence? What are you doing?

13 MR. TROWEL: She testified about the contents a
14 moment ago, your Honor.

15 THE COURT: No, you are not going to do it by
16 putting in a report that I kept out.

17 BY MR. TROWEL:

18 Q Did Dr. Grant diagnose the defendant with Alzheimer's, if
19 you recall?

20 A No.

21 Q So, Dr. Brauman -- do you recall what Dr. Grant's
22 diagnosis was?

23 THE COURT: The question is: Do you recall it,
24 without referring to any document?

25 Do you recall what the diagnosis was, yes or

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1 no?

2 THE WITNESS: Yes.

3 Q What was it?

4 A In part I do, and there was mention of a possible
5 diagnosis of dementia, but it wasn't confirmed.

6 Q So, is it fair to say that neither Dr. Brauman, nor Dr.
7 Grant, diagnosed the defendant with Alzheimer's?

8 A Correct.

9 Q And you, in fact, did not diagnose the defendant with
10 Alzheimer's either, correct?

11 A Correct.

12 Q You testified on direct, and also on redirect, that you
13 believed that it would be unethical for the defendant to stand
14 trial; is that correct?

15 A Correct.

16 Q Are you an ethicist?

17 A No.

18 Q Are you an expert in judicial ethics?

19 A No.

20 Q Are you an expert in legal ethics?

21 A No.

22 Q What is the basis for your opinion?

23 A Based on my understanding of the level of cognitive
24 impairment that he has, and --

25 Q Is that an ethical opinion?

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1 THE COURT: Have you finished your answer?

2 THE WITNESS: No.

3 THE COURT: Why don't you allow the witness to
4 finish the answer, rather than interrupting the answer.

5 Why don't you read the question and answer
6 back.

7 THE COURT REPORTER: Yes, your Honor.

8 (The previous question and answer are read back.)

9 THE WITNESS: And the likely complexity
10 required to be part of the trial.

11 Q So is that a competency evaluation or an ethical
12 evaluation?

13 THE COURT: You were asked the question about
14 your ethical view, right?

15 THE WITNESS: Yes.

16 THE COURT: You gave the answer to the question?

17 THE WITNESS: I did.

18 THE COURT: Okay, that's fine. I'm the expert on
19 ethics. Let's go on.

20 MR. TROWEL: Nothing further, your Honor.

21 MS. DOLAN: Nothing further.

22 THE COURT: Doctor, you may step down.

23 THE WITNESS: Thank you.

24 THE COURT: Please call your next witness.

25 MS. DOLAN: The defense rests.

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1 THE COURT: The government wish to call a witness?

2 MR. TROWEL: Yes, your Honor. The government calls
3 Dr. Tracy Pennuto.

4 T R A C Y P E N N U T O,

5 called as a witness, having been first duly

6 sworn, testifies as follows:

7 THE COURT: Doctor, please state your name clearly
8 into the microphone. If you state it clearly, you will sound
9 like this (indicating.) If you don't, you will sound like
10 this (indicating), and spell it for the reporter, and then
11 counsel will inquire.

12 THE WITNESS: Dr. Tracy O'Connor Pennuto, T-r-a-c-y,
13 O'C-o-n-n-o-r, P-e-n-n-u-t-o.

14 MR. TROWEL: May I proceed, your Honor?

15 THE COURT: You may.

16 MR. TROWEL: Thank you.

17 DIRECT EXAMINATION

18 BY MR. TROWEL:

19 Q Dr. Pennuto, where are you employed?

20 A I'm employed at FMC Butner.

21 Q What does FMC stand for?

22 A Federal Medical Center.

23 Q What is your title at FMC Butner?

24 A Staff Neuropsychologist.

25 Q Briefly, what are your responsibilities at FMC Butner?

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1 A Seventy-five percent of my job duties entail providing
2 neuropsychological consultation, and 25 percent of my job
3 duties entail supervision of mental health services for the
4 general population.

5 Q Can you just briefly describe -- withdrawn.

6 In the course of your employment at Butner,
7 have you participated in evaluations to determine if an inmate
8 can be restored to competency?

9 A I have.

10 Q Approximately how many have you participated in?

11 A Approximately 150.

12 Q What was your role in those evaluations?

13 A I provided neuropsychological consultation.

14 Q Did you do that in each of those approximately 150 exams?

15 A Yes.

16 Q Have you been qualified as an expert in federal courts
17 previously?

18 A Yes, I have.

19 Q How many times?

20 A Nine times.

21 Q In what courts, if you know?

22 A Alabama, Arizona, Utah, D.C.

23 Q Always in federal courts?

24 A Yes.

25 Q What was the purpose of that testimony, when you

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1 qualified as an expert?

2 A To provide my opinion regarding the neuropsychological
3 assessments.

4 Q With respect to competency evaluation or restoration
5 evaluation?

6 A Yes.

7 Q Are you licensed?

8 A Yes. I'm licensed in North Carolina.

9 Q Did there come a time when you participated in an
10 evaluation of the defendant Semyon Bumagin to determine if he
11 could be restored to competency?

12 A Yes.

13 Q Could you describe, generally, what your role was with
14 respect to Mr. Bumagin's evaluation?

15 A Yes. I was brought in as a consultant to provide
16 neuropsychological assessment.

17 Q What does that mean?

18 A That means there were questions about his cognitive
19 abilities, so I was brought in to evaluate them.

20 Q How do you do that?

21 A I do testing to assess his cognition, his thinking
22 skills, and his cognitive abilities.

23 Q In your role as a neuropsychologist participating in a
24 restoration evaluation, do you do anything differently than
25 you would do in a competency evaluation?

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1 A No.

2 Q Showing you what has been marked for identification as
3 Government's Exhibit 1-A.

4 Do recognize that?

5 A I do.

6 Q What is that?

7 A That's the Butner neuropsychological report.

8 Q Is this the report that contains your analysis of the
9 defendant Mr. Bumagin?

10 A It is.

11 MR. TROWEL: The Government moves to admit
12 Government Exhibit 1-A into evidence.

13 MS. DOLAN: May I have a brief voir dire on this,
14 your Honor?

15 THE COURT: Sure.

16 VOIR DIRE

17 BY MS. DOLAN:

18 Q Ms. Pennuto, what sources did you rely upon to generate
19 this report?

20 A I'm not sure I understand your question.

21 Q What did you rely on to generate this report?

22 A What sources meaning what collateral information?

23 Q Well, you asked me to repeat the question, so I did, and
24 I rephrased it and I left out sources. I'm asking you what
25 you relied on to generate this report?

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1 A I'm not sure I understand your question.

2 Q What did you use to generate this report?

3 THE COURT: You really got to be kidding the court.
4 You don't understand, when she says what sources did you rely
5 upon to generate a report, you are telling this court that you
6 don't understand that question, when you have been an expert
7 in federal court?

8 When a lawyer asks you what did you rely on,
9 what sources did you rely upon to generate a report, you can't
10 answer that question? Are you really telling me that?

11 THE WITNESS: Your Honor --

12 THE COURT: Are you really telling me you can't tell
13 her what you relied upon? Because if you are telling me that
14 now, I will not let you testify as an expert.

15 So let's try it again. I will ask you, what
16 sources did you rely upon in generating this report? Can you
17 answer my question? Because if you can't, you can go sit down
18 out there.

19 THE WITNESS: Your Honor, the sources -- the
20 collateral sources that I relied upon would be medical
21 records, prior neuropsychological evaluations, his medical --

22 THE COURT: I knew you can do it. Keep going. What
23 other sources did you rely upon? What other sources, however
24 defined, collateral, incollateral, direct, indirect. What
25 sources did you rely upon in generating the report?

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1 THE WITNESS: My clinical interview with Mr.
2 Bumagin.

3 THE COURT: What else?

4 THE WITNESS: All of the testings that I
5 participated in with Mr. Bumagin.

6 THE COURT: What else?

7 THE WITNESS: Interaction with staff.

8 THE COURT: What else?

9 THE WITNESS: That may be all of them.

10 THE COURT: Okay.

11 BY MS. DOLAN:

12 Q Did you rely on any information or reports from Dr.
13 Grant?

14 A No.

15 Q Did you speak to Dr. Grant about this individual, before
16 you generated this report?

17 A Yes.

18 Q Did Dr. Grant provide you any information about this
19 individual at that time?

20 A She provided -- yes, she did.

21 Q What information did she provide you?

22 A She provided me with some medical records, and her
23 concerns about his cognition. She provided me with the two
24 prior neuropsychological evaluations -- the one prior
25 neuropsychological evaluation, and the one prior forensic

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1 evaluation.

2 Q And what were her concerns?

3 A Her concerns were that he had -- the prior evaluations
4 had mentioned rule out or a diagnosis of dementia, so she was
5 concerned about the potential that he may have cognitive
6 impairments.

7 Q And did she discuss the nature of her concerns any
8 further?

9 A I don't recall.

10 Q Did she -- you said you discussed the staff's
11 interactions with Mr. Bumagin in generating this report?

12 A Yes.

13 Q And that includes Dr. Grant?

14 A Yes.

15 Q And so Dr. Grant provided you information about her
16 interactions with Mr. Bumagin, and you used that information
17 to generate this report?

18 A Potentially, I don't remember.

19 Q Did Dr. Grant tell you that she had spoken to
20 Mr. Bumagin?

21 A Sure.

22 Q Did she tell you that she had administered a competency
23 questionnaire?

24 A I don't recall.

25 Q Did she provide you with that competency questionnaire?

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1 A She did not.

2 Q Did she discuss -- do you recall whether she discussed
3 that competency questionnaire, or anything relating to it with
4 you?

5 A I don't recall.

6 Q Did she discuss the charges of the case?

7 A I knew what his charges were.

8 Q Did she discuss that with Dr. Grant?

9 A I believe she did tell me what his charges were.

10 Q Did you discuss any statements that Mr. Bumagin made
11 about his case with Dr. Grant?

12 A No.

13 Q Did Dr. Grant provide you any notes about any
14 conversations that she had with Mr. Bumagin about his case?

15 A No.

16 Q Would those have been part of the medical records?

17 A Potentially?

18 THE COURT: In the ordinary course, would the
19 notes be part of the medical records, if there were notes
20 generated, in the ordinary course, in your experience?

21 THE WITNESS: Sometimes, yes, your Honor.

22 THE COURT: Go ahead.

23 BY MS. DOLAN:

24 Q Can you describe the process-- what exactly do you
25 review? Do you review a file?

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1 A I am provided with information, which I compile into a
2 file.

3 Q And here Dr. Grant referred this particular client to
4 you, correct?

5 A Correct.

6 Q And did she provide you with a file?

7 A No.

8 Q Who provided you with a file?

9 A I was not provided with a file. I was provided with
10 specific pieces of information, which I then made my own file.

11 Q And did you review the file otherwise?

12 A No.

13 Q But you don't recall specifically whether the
14 questionnaire or anything regarding it was within the file?

15 A No. I know the questionnaire was not in the file. I
16 only requested information that was relevant to his cognitive
17 functioning. I did not take part in the competency
18 evaluation.

19 Q Didn't you say earlier that you didn't recall whether
20 that information or anything relating to it was in the file?

21 A I don't believe I said that.

22 Q Well, did you say earlier that sometimes that information
23 would be in the file?

24 A I don't recall.

25 MS. DOLAN: Your Honor, I'm going to make an

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1 objection based on this witness' inability to completely
2 exclude the tainted portions of the Grant evaluation.

3 THE COURT: The objection is sustained. The
4 document does not come in. Proceed with your examination.
5 The document is out.

6 DIRECT EXAMINATION (Cont'd.)

7 BY MR. TROWEL:

8 THE COURT: The document is out. Take it off the
9 elmo. Out means out.

10 Q Now, Dr. Pennuto, over the course of the evaluation that
11 you did of Mr. Bumagin, did you meet with him?

12 A I did.

13 Q How many times?

14 A Three times.

15 Q For how long?

16 A Approximately three and a half hours.

17 Q Could you describe his demeanor, when you interacted with
18 him?

19 A Sure. When I met with him, I always went to escort him
20 from his unit to the testing room and he was quite gregarious
21 and boisterous. He was greeted in the hallway by other
22 inmates. They called him, hey, Russian, and he would say,
23 hey. He was have talkative in his interactions with me, very
24 polite and cooperative, at times irritable when some of the
25 tests were difficult, but cooperative with the evaluation.

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1 Q In the course of the testing you did, were you also
2 working with an intern?

3 A I was.

4 Q Who was that?

5 A Dr. Correa.

6 Q Do you know how often she met with the defendant?

7 A She met with him twice.

8 Q What was your role with respect to Dr. Correa, if any?

9 A I supervised her administration of her psychological
10 testing.

11 Q What does that mean, generally?

12 A That means I met with her in advance to determine what
13 tests she was competent to give. And then after she had
14 administered those tests, I met with her again to oversee the
15 scoring and interpretation of those tests.

16 Q Were you present when Dr. Correa administered the tests
17 to the defendant?

18 A No, I was not.

19 Q Why not?

20 A Because there's literature that shows that there are
21 third-party effects, if there's a third person in the room
22 with the testing. That can negatively impact the person's
23 performance on the test.

24 Q When you administered the test yourself, was there anyone
25 else in the room, other than Mr. Bumagin?

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1 A No, there was not.

2 Q Approximately how many tests did you and Dr. Correa
3 perform on the defendant?

4 A I believe 15.

5 Q And what generally were the tests intended to measure?

6 A It was a comprehensive test battery designed to test
7 executive function, language, facial skills, intellect,
8 effort.

9 Q Did you also -- and you did test for effort, you said?

10 A I did test for effort.

11 Q With respect to the memory tests, how did Mr. Bumagin
12 perform?

13 A Generally, he performed poorly.

14 Q Was there anything notable about the way he performed on
15 those tests or how he undertook them?

16 A He was quick to give up during the memory tests. Rather
17 than persevering in what seemed to be trying hard, he would
18 answer immediately and then quickly give up.

19 Q Was that significant to you?

20 A Yes. It indicated that he may not be putting forth good
21 effort.

22 Q In your experience working with Mr. Bumagin, did you see
23 that he behaved inconsistently, depending on who he was with?

24 A I did.

25 Q Could you describe that a little bit for us?

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1 A Sure. When he met with me, he was not able to give me
2 the correct date. He incorrectly stated his age. So there
3 was some disorientation about him. When he met with Dr.
4 Correa, he was fully oriented.

5 MS. DOLAN: Objection.

6 THE COURT: Overruled.

7 A Fully oriented, was able to give the correct date, his
8 age, date of birth, all of the relevant information. But then
9 later that same day when he was involved with group testing,
10 he presented as confused and wandering, and needing direction.
11 So there was quite a range of his behavior presentation.

12 Q What, if anything, did that indicate to you?

13 A It indicated inconsistency in his presentation, which was
14 consistent with the inconsistency that was in his testing as
15 well.

16 Q Why is inconsistency relevant, or is it relevant?

17 A It is relevant.

18 Q Why?

19 A Inconsistency indicates that he was not consistently
20 giving good effort, and that can impact the testing.

21 Q Was his inconsistent behavior with employees at Butner,
22 could it have been consistent with the medical condition?

23 A It could have, but that's unlikely, because Mr. Bumagin
24 was very vocal about his medical needs, and always sought out
25 help when it was needed. And also because he likely would

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1 have demonstrated other symptoms that would have indicated
2 that he was having medical issues.

3 Q Did you see other symptoms that were consistent with a
4 medical condition?

5 A I did not.

6 Q Could the inconsistent behavior have been -- withdrawn.
7 Could it have been consistent with dementia?

8 A It could been consistent with some forms of dementia.

9 Q Which forms of dementia?

10 A More like a frontal temporal dementia, has a confusional
11 state, but the type of dementia that has been suspected for
12 Mr. Bumagin, an Alzheimer's type of dementia, which does not
13 typically present with that confusional state in which he
14 would present so differently within a couple of hours.

15 Q As a neuropsychologist and clinical psychologist and
16 correctional psychologist, was his inconsistent behavior
17 manipulative?

18 A Yes.

19 Q What does that mean to you?

20 A That means that Mr. Bumagin was very invested in showing
21 that he had memory impairment. And so it seems as though he
22 would be exaggerating with the impairments from the testing,
23 which was evident in the inconsistencies in the test results,
24 but also it seemed apparent in his behavioral presentation as
25 well.

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1 Q Now, you mentioned that you conducted tests of the
2 defendant's effort; is that correct?

3 A That's correct.

4 Q Why did you do that?

5 A It's important to assess someone's effort to ensure that
6 the test results are valid.

7 Q Can you explain that, why are those two linked?

8 A If someone is not putting forth their best effort during
9 a test evaluation, then the test results do not reflect the
10 optimal abilities, which means that the test results would
11 then likely underestimate their actual abilities.

12 Q What did you find with respect to Mr. Bumagin, the test
13 that you did on his effort?

14 A The test results were inconsistent.

15 Q What do you mean by that?

16 A He passed, if you will, some of the effort tests;
17 whereas, as other effort tests he did not.

18 Q When you say passed, do you mean he showed sufficient
19 effort?

20 A Yes.

21 Q And when you say on other tests he did not, what do you
22 mean by that?

23 A That means he scored below the cutoff, which would
24 indicate that he was getting good effort.

25 Q When you say cutoff, who establishes that?

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1 A The test publishers.

2 Q Is that part of the test itself, part of the instructions
3 for administering the test, or how do you learn -- withdrawn.

4 How do you learn of the cutoff?

5 A For standardized tests, the cutoff is in the manual. For
6 other effort entities that are derived from traditional
7 measures, those are found in the research literature.

8 Q What was your conclusion, if any, with respect to these
9 tests -- withdrawn.

10 What was your conclusion, if any, about
11 Mr. Bumagin's effort?

12 A My conclusion was that Mr. Bumagin's effort was
13 inconsistent.

14 Q What did that in turn mean to you, if anything?

15 A That means that he was not consistently giving good
16 effort throughout the testing evaluation. So that means that
17 the test results likely don't reflect his optimal abilities,
18 which means that the test results underestimated what he was
19 actually able to do.

20 Q Did you administer to Mr. Bumagin the WMS-IV Test?

21 A I did.

22 Q What is that?

23 A That's the Wechsler Memory Scale --

24 THE COURT: Would you spell that for the
25 reporter, please.

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1 THE WITNESS: W-e-c-h-s-l-e-r Test.

2 Q You were referring to the WMS-IV Test, correct?

3 A Yes.

4 Q What does that test measure?

5 A That is a memory test, and the specific subtest that I
6 administered are called the Logical Memory Subtests.

7 Q Did you, yourself, administer this test to Mr. Bumagin?

8 A I did.

9 Q Sorry to interrupt.

10 A And the subtests, I will read a short story to
11 Mr. Bumagin and ask him to repeat back as much of the story as
12 he can recall, and there are two stories.

13 Q And what was the result of the tests?

14 A Well, the results showed poor. He showed impairment. He
15 performed poorly.

16 Q In what way?

17 A He was unable to give back very much of the information
18 immediately or after a delay.

19 Q And what was his score on the test, if you recall --
20 withdrawn.

21 Were the test results significant to you?

22 A Yes.

23 Q Why?

24 A Because after the immediate and the delayed recall, there
25 is a recognition subtest in which 30 questions are read to

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1 Mr. Bumagin, and they are yes/no questions. He was only able
2 to get ten out of those 30 correct.

3 Q And what, if anything, did that mean to you?

4 A Well, because they are yes/no questions, that means that
5 someone who had never even heard the stories at all could
6 guess and get 50 percent of them correct. So we would expect
7 at least 15 out of the 30 correct, and he was only able to get
8 ten out of the 30.

9 But what was more important than that is that
10 on the second set of questions, the last 15 which dealt with
11 the second story that I read to him, he only got three out of
12 the 15 correct. It's statistically very improbable that
13 someone would only get three out of the 15 just from guessing.

14 Q What, if anything, does that mean to you?

15 A Well, that means to me that he correctly knew the correct
16 answers and purposely chose the wrong ones to exaggerate his
17 cognitive ability.

18 Q What, if anything, does that tell you about his cognitive
19 ability?

20 A That tells me that he has a cognitive wherewithal to
21 think in his best interest, and to try and feign. That showed
22 that there was a purposeful and intentionality to his
23 exaggeration.

24 MS. DOLAN: I am going to move to strike that as too
25 speculative.

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1 THE COURT: Overruled.

2 BY MR. TROWEL:

3 Q Did you find that Mr. Bumagin's performance on the test
4 was consistent with known patterns of brain dysfunction?

5 A No.

6 Q Can you explain that?

7 A On that test in particular or --

8 Q Or just even in general?

9 A Well, there were other memory tests in which there were
10 several trials, which means that I would present him with the
11 information more than once to see how much he could improve
12 with repetition, and there were times where the first trial he
13 would get several bits of information correct, then on the
14 second trial he couldn't remember any of it at all. There
15 were other instances like that where his pattern of
16 performance would be inconsistent with what we know about how
17 the brain functions.

18 Q What, if anything, did that tell you?

19 A Again, that he was likely exaggerating.

20 Q Did you find that Mr. Bumagin had memory or other
21 cognitive deficits?

22 A In what way?

23 Q Did you find that he had cognitive deficits?

24 A I believe that it's possible that he may have cognitive
25 deficits, yes.

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1 Q Why would you say it is possible?

2 A Because he didn't give good effort on the tests, and the
3 inconsistency of his efforts limits the interpretation I can
4 make from those results.

5 Q Now, in the course of your analysis, did you review the
6 evaluation completed by Dr. Brauman?

7 A I did.

8 Q And did she do some effort testing on the defendant as
9 well?

10 A She did.

11 Q Were your test results consistent with hers?

12 A Yes.

13 Q What does that mean, generally? When you say that they
14 were consistent, what do you mean?

15 A Her test results found that he was also giving
16 inconsistent effort at MCC New York, just as he did at Butner.

17 Q Did you also review an analysis completed by Dr.
18 Rivera-Mindt?

19 A I did.

20 Q What kind of testing did Dr. Rivera-Mindt conduct?

21 A She conducted a comprehensive neuropsychological
22 evaluation.

23 Q And prior to today's hearing, did you exchange raw data
24 with Dr. Rivera-Mindt?

25 A I did.

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1 Q Could you just describe generally what raw data means for
2 a neuropsychologist?

3 A Sure. Raw data means the actual test protocol with the
4 questions and the answers that were obtained.

5 Q Is the competency questionnaire that was discussed during
6 the previous witness, is that part of your raw data?

7 A No, it is not.

8 Q Did you administer that questionnaire?

9 A No, I did not.

10 Q So, you reviewed Dr. Rivera-Mindt's raw data and she also
11 had yours for review; is that correct?

12 A That's correct.

13 Q Did Dr. Rivera-Mindt's test the defendant's effort?

14 A She did.

15 Q After reviewing Dr. Rivera-Mindt's raw data, did you
16 determine whether your test results were consistent with hers?

17 A They seemed to be, yes.

18 Q So, is it fair to say that in your evaluation of Dr.
19 Rivera-Mindt's raw data, you saw the same lack of effort in
20 her results as you saw in your own?

21 A I saw the same inconsistency in his performance on the
22 effort tests as I did in mine, yes.

23 Q Did Dr. Rivera-Mindt interpret the results of her testing
24 differently than you interpreted the results of the test that
25 you administered?

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1 A She did.

2 Q Can you elaborate on that?

3 A Sure. She interpreted her test results with Mr. Bumagin
4 as being valid. She felt he did give good effort.

5 Q You mentioned earlier you used the phrase cutoff; is that
6 right?

7 A That's correct.

8 Q Were there tests in Dr. Rivera-Mindt's raw data where the
9 defendant fell below the cutoff?

10 A Yes.

11 Q Did you review her report?

12 A I did.

13 Q Did she nevertheless conclude that he gave sufficient
14 effort?

15 A Overall, she did.

16 Q Did you disagree with her analysis of the results of
17 those effort tests?

18 A I did.

19 Q How, if at all, is that disagreement about the results of
20 the effort tests relevant to your report or to the comparison
21 between the two reports?

22 A Can you repeat that question?

23 THE COURT: Why don't you read it back.

24 MR. TROWEL: May I withdraw it, your Honor?

25 THE COURT: Why don't you read it back first.

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1 (The question is read back.)

2 THE COURT: Why don't you withdraw the
3 question, put another one, and break it into two parts, that's
4 the problem.

5 MR. TROWEL: Thank you. Withdrawn.

6 Q How is that disagreement relevant, if at all?

7 A It is very relevant. Dr. Rivera-Mindt again felt that he
8 was giving good effort, but then she was able to fully
9 interpret. She felt that she was able to fully interpret her
10 results, then diagnosed dementia. On the other hand, I felt
11 that he was giving inconsistent effort, which limits our
12 ability to say much about his cognitive functioning because of
13 the inconsistent effort.

14 Q And with respect to the cutoffs, is it fair to say that
15 the cutoff applies every time the test is administered, that a
16 test that has a cutoff -- withdrawn.

17 THE COURT: You got to ask one question, not two.
18 It will help you.

19 MR. TROWEL: Thank you.

20 THE COURT: You're welcome.

21 BY MR. TROWEL:

22 Q You administered the -- you said earlier you administered
23 the WMS-IV Test, correct?

24 A Correct.

25 Q Did Dr. Rivera-Mindt administer the WMS-IV Test, the same

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1 version of that test?

2 A No, she did not.

3 Q What test did she administer?

4 A She also administered the WMS-IV, but she used the older
5 adult version.

6 Q When you say WMS-IV, is that the WMS-IV?

7 A It is, yes.

8 Q Was that notable to you that she used the older adult
9 test?

10 A It was --

11 Q Why?

12 A -- notable, because Mr. Bumagin was not currently in the
13 age range for that test that she administered.

14 Q Why is that significant, if all?

15 A Because that means that inappropriate norms were used to
16 score his results.

17 Q What is the possible result of that inappropriate norm,
18 in this case, if you know?

19 A Well, because she used a test that would be used for
20 older adults. They would not be expected to perform as well,
21 which means that that it would actually -- it would actually
22 help his score. He would have performed better on that one.

23 Q Were there other tests administered by Dr. Rivera-Mindt
24 that you disagreed with?

25 A There were other tests that I have concerns about.

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1 Q Can you give us an example of that? Give the court an
2 example?

3 A Sure. The Boston Naming Test was one of them.

4 Q Why were you concerned about the use of that test?

5 A That test in particular there's a lot of concern in the
6 literature about the cultural bias in that test, even in other
7 English-speaking countries, but particularly for those who
8 speak English as a second language.

9 Q And what does the research say about the test, generally?

10 A It says that it may not be appropriate for use.

11 Q Why is that, if you know?

12 A It unnecessarily penalizes the examinee for not being
13 able to name culturally biased items.

14 Q Is it fair to say that the defendant's performance on
15 that would underestimate his true abilities?

16 A Yes.

17 Q Did Dr. Rivera-Mindt administer the WAIS-III Test?

18 A She did administer two subtests from that.

19 Q And was that a cause of concern for you?

20 A Well, I was surprised for one that a full intelligence
21 measure was not used. She instead opted to use an abbreviated
22 measure, which was the WASI.

23 Q When you say WASI, is that W-A-S-I?

24 A It is, which is an abbreviated measure includes four
25 subtests. Instead of ten, then, she supplemented that with

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1 the processing speed, subtests, from the WASI-III, which is an
2 earlier version of an intelligence test, which is now in its
3 fourth edition.

4 Q When you say earlier version, what do you mean?

5 A That means that a new version has come out.

6 Q Is it appropriate protocol to use a replaced version of a
7 test?

8 A Repeat that question, please.

9 THE COURT: Is it appropriate protocol to use a
10 replaced version of that test?

11 Q Or outdated version of the test. It is much more
12 appropriate to use the current version, and that test was
13 updated in 2008.

14 Q And Dr. Rivera-Mindt conducted her test in 2012; is that
15 right?

16 A That's my understanding, yes.

17 Q Now, when you looked at the raw data that you received
18 from Dr. Rivera-Mindt, did you compare her test results
19 overall to your test results?

20 A I did.

21 Q And I think you just mentioned this, but she conducted
22 her testing in May 20, 2012, as far as you know?

23 A Correct.

24 Q When did you conduct your testing, generally?

25 A In March 2013.

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1 Q Over that period between Dr. Rivera-Mindt's testing and
2 your testing, did the defendant's performance improve or
3 deteriorate?

4 A On some tests he performed more poorly, and on some tests
5 there was some improvement.

6 Q When you say on some tests there was some improvement,
7 can you describe that a little bit for us?

8 A Yes. There were some tests that were similar to the ones
9 that were given by Dr. Rivera-Mindt in which Mr. Bumagin
10 performed better on the tests that I administered.

11 Q Could you give an example to the court?

12 A Sure. Similarities subtests.

13 THE COURT: Would you spell that for the reporter

14 THE WITNESS: S-i-m-i-l-a-r-i-t-i-e-s, I believe.

15 Q Can describe what you saw, the results -- withdrawn.

16 Is that the test you administered?

17 A We both administered a similarity subtest.

18 Q What did you see in the results?

19 A He performed better, in my evaluation.

20 Q What does that test test for?

21 A Verbal abstract reasoning.

22 Q Could you draw any conclusions from the fact that he
23 improved on some tests over that period?

24 A I can. It could indicate that he was simply not giving
25 good effort with Dr. Rivera-Mindt, because if he was

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1 performing at his optimal ability during her evaluation, he
2 wouldn't have shown improved abilities a year later.

3 Q Is an improvement in some tests consistent with the
4 dementia increasing in severity?

5 A Not usually, no.

6 Q You mentioned that there were some tests that were given
7 that were the same or roughly the same when Dr. Rivera-Mindt
8 gave them and you gave them, right?

9 A Correct.

10 Q Did you have any concerns about the practice effect?

11 A I didn't because of the time frame, and I gave alternate
12 versions when available.

13 MR. TROWEL: Nothing further, your Honor.

14 THE COURT: Your witness.

15 CROSS-EXAMINATION

16 BY MS. DOLAN:

17 Q Dr. Pennuto --

18 A Yes?

19 Q I believe you testified that the overall results of the
20 Rivera-Mindt tests and Brauman tests and Butner tests,
21 generally speaking, were consistent across the board?

22 A Primarily Dr. Rivera-Mindt and Butner's psychological
23 results, yes.

24 Q Mr. Trowel asked you to say out loud three or four tests
25 that you had discrepancies with the second to last edition of

T. Pennuto - Redirect/Trowel

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1 the current edition. How many tests did Dr. Rivera-Mindt
2 administer in total?

3 A I'm not sure. Roughly about the same total I did, 15 or
4 so.

5 Q Let's count them?

6 A Okay.

7 Q Showing you what's in evidence as DX-7, page 7.

8 How much do you see on that page?

9 A Six.

10 Q Page 8?

11 A Total of 18.

12 Q And, in fact, a number of those tests were the same ones
13 that you, yourself, administered, correct?

14 A Several, yes.

15 THE COURT: You may continue.

16 BY MS. DOLAN:

17 Q Do any of the tests administered by anyone have any
18 impact on the MRIs?

19 A No.

20 MS. DOLAN: Nothing further.

21 THE COURT: Your witness.

22 REDIRECT EXAMINATION

23 BY MR. TROWEL:

24 Q Dr. Pennuto, there came a time -- did there come a time
25 when consulted with Dr. Grant and provided the results of your

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1 testing to her?

2 A I did.

3 MS. DOLAN: Beyond the scope.

4 THE COURT: It's sustained.

5 BY MR. TROWEL:

6 Q Is it possible, Dr. Pennuto, for an individual who has
7 dementia to become competent?

8 A Yes.

9 MS. DOLAN: Beyond the scope.

10 THE COURT: Sustained.

11 MR. TROWEL: Nothing further, your Honor.

12 THE COURT: Any further questions?

13 MS. DOLAN: No, I don't think so. Everything was
14 sustained.

15 THE COURT: It was. I'm just asking if you
16 have any further questions.

17 MS. DOLAN: No. Thank you.

18 THE COURT: All right. You may step down.

19 Next witness, please.

20 MR. TROWEL: The government calls Dr. Amor

21 Correa. A M O R C O R R E A,

22 called as a witness, having been first duly

23 sworn,

24 testifies as follows:

25 THE COURT: Doctor, good afternoon, almost good

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1 evening. Please be seated.

2 Please state your name clearly into this
3 microphone and spell it for the record, then counsel will have
4 some questions for you.

5 THE WITNESS: I am Dr. Amor Correa. First name
6 is A-m-o-r. My last name is C-o-r-r-e-a

7 THE COURT: You may proceed.

8 MR. TROWEL: Thank you, your Honor.

9 DIRECT EXAMINATION

10 BY MR. TROWEL:

11 Q Good afternoon, Dr. Correa.

12 A Good afternoon.

13 Q Where do you work?

14 A I'm currently employed as a staff psychologist at MDC
15 Brooklyn.

16 Q And what is your title there? I'm sorry, you just said
17 that, withdrawn.

18 How long have you worked at MDC Brooklyn?

19 A I have worked there since September of 2013.

20 Q And before you worked at MDC Brooklyn, where did you
21 work?

22 A I was a predoctoral psychology intern at FMC Butner.

23 Q What were your responsibilities at FMC Butner?

24 A At Butner I had several different responsibilities. I
25 conducted therapy with inmates in the general population. One

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1 of my primary duties was to also conduct forensic evaluations.

2 Q And approximately how many forensic evaluations did you
3 participate in?

4 A At FMC Butner, I participated in approximately 16.

5 Q And did you participate in any forensic evaluations at
6 other institutions?

7 A Yes, I also conducted forensic evaluations at FMS
8 Carswell in Ft. Worth, Texas.

9 Q What was your role in those evaluations?

10 A At Butner, I H two different types of roles. I was the
11 secondary evaluator in some of the evaluations, which means
12 that I was responsible for conducting psychological testing,
13 and interpreting and writing up those test results. And in
14 some cases I was the primary evaluator, where I had the same
15 responsibilities that I just mentioned; and, in addition, I
16 conducted collateral interviews, reviewed the entirety of the
17 records that were relevant to each case, and drafted the
18 majority of the report.

19 Q Have you ever been qualified as an expert in federal
20 court?

21 A Yes.

22 Q How many times?

23 A Three times.

24 Q Do you recall what courts?

25 A Yes, Beumont, Texas; San Diego, California; and

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1 Jacksonville, Florida.

2 Q Those were all federal courts?

3 A Yes.

4 Q Are you currently licensed?

5 A No.

6 Q Why not?

7 A I am in my first post-doctoral year, and generally people
8 spend that year accumulating hours, still under the
9 supervision of licensed psychologists before they, themselves,
10 can be licensed, and they also take the licensing exam.

11 Q Did you participate in the evaluation of Mr. Bumagin?

12 A Yes, I did.

13 Q What role did you play in that evaluation?

14 A I was the secondary evaluator, so I conducted and scored
15 some of the tests.

16 Q Did you convey the results of the tests to Dr. Pennuto?

17 A Yes.

18 Q And did you convey them to Dr. Grant as well?

19 A Yes.

20 Q Were you aware of Dr. Grant's conclusions in this case?

21 A Yes.

22 Q Her final opinion, rather?

23 A Yes.

24 Q What was it, if you know?

25 A She determined that he was competent to stand trial.

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1 Q Did you agree with that conclusion?

2 A Yes.

3 Q Do you have an opinion about the defendant's competency,
4 as he sits here today?

5 A Currently, no.

6 Q Why not?

7 A It's been more than a year since I evaluated him.

8 Q Why is that relevant?

9 A Because competency is a fluid issue, that is, it can
10 change even up to a daily basis. It very much depends on the
11 point in time when the competency -- let me go back.

12 It depends on the actual point in time that we
13 are talking about. So someone's competency can be different
14 now from the date of the evaluation.

15 THE COURT: Have you ever seen a patient whom
16 you considered to be incompetent today, incompetent tomorrow,
17 incompetent forever?

18 THE WITNESS: That is a possibility.

19 THE COURT: Have you ever seen such a patient?

20 THE WITNESS: I don't know that I ever evaluated --

21 THE COURT: Have you ever seen such a patient?

22 THE WITNESS: Yes.

23 THE COURT: What are the criteria by which you
24 would say the patient is not competent today, will not be
25 competent tomorrow, will never be competent, assuming the

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1 patient is not dead?

2 It's possible for somebody to be found not
3 competent and not restorable.

4 THE COURT: Let me stop you right there.

5 Have you ever seen such a person?

6 THE WITNESS: Yes.

7 THE COURT: What does that look like when you
8 see it?

9 THE WITNESS: All right. Typically that person will
10 have been through already one initial competency evaluation,
11 and in the federal system would have been referred to -- would
12 have been referred for a second competency evaluation, which
13 includes the restoration period. Some individuals undergo a
14 third competency and restoration period, and if at that point
15 they are determined for whatever the particulars of their case
16 should be, to be found not competent and not restorable, then
17 they go into a different stage where there's a separate
18 evaluation that is conducted whether that person should be
19 civilly committed.

20 THE COURT: Now, you have seen such people?

21 THE WITNESS: Yes.

22 THE COURT: Okay. Go ahead.

23 BY MR. TROWEL:

24 Q You said earlier that you participated or that you
25 administered testing to the defendant; is that right?

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1 A Yes.

2 Q How many times did you meet with him?

3 A I met him on two occasions formally.

4 Q For how long each time?

5 A Let's see. I don't know how long each session was, but I
6 met with him for a total of three and a half hours for
7 testing.

8 Q And you were supervised by Dr. Pennuto at that time,
9 correct?

10 A Yes.

11 Q But when you administered the tests, were you alone with
12 Mr. Bumagin?

13 A Yes.

14 Q Why is that?

15 A That is because there's literature and lot of research
16 that shows that having a third person, or any additional
17 people, in a testing room can affect and change how somebody
18 performs on the test in question, especially for cognitive
19 tests.

20 Q In addition to the testing sessions that you had with the
21 defendant, did you interact with him in less formal settings?

22 A Yes.

23 Q Can you describe those for the court?

24 A I would see him in the hallways, sometimes, say hello and
25 greet him briefly.